TEAK PARADISE SDN BHD & ANOR v. KINA-JUARA SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI
MAIRIN IDANG JC
[ORIGINATING SUMMONS NO: MYY-24NCvC-37-10-2014 (HC)]
29 MAY 2015

LAND LAW: *Caveat – Removal of – Application for – Whether second plaintiff registered proprietor of land – Whether occupation and cultivation of state land conferred on defendant caveatable interest – Whether ss. 10(1), 44 & 209(1) of Sarawak Land Code made it unlawful for any occupation of state land – Department of Land and Survey issued Provisional Land to plaintiffs – Whether land was no longer available for application by defendant – Whether caveat should be removed*

LAND LAW: *Caveats – Caveatable interest – Whether defendant had beneficial interest in land – Whether occupation and cultivation of state land conferred on defendant caveatable interest – Whether ss. 10(1), 44 & 209(1) of Sarawak Land Code made it unlawful for any occupation of state land – Whether pending suit against plaintiff claiming declaratory relief clothed defendant with caveatable interest – Whether interest should be existing interest to entitle defendant to maintain caveat – Whether there was inordinate and inexcusable delay in filing suit – Whether caveat should be removed*

The first plaintiff was the duly appointed attorney of the second plaintiff, the registered proprietor of a parcel of land containing an area of 304 hectares ('Lot 16'). The defendant had entered into and planted oil palm trees on approximately 720 hectares of land which included Lot 16 ('the subject land'). On 3 September 2012, the defendant lodged a caveat against Lot 16 ('the said caveat'). Subsequently, the plaintiffs filed an application ('encl. 1') to remove the said caveat on the grounds, *inter alia*, that (i) the second plaintiff was still the registered proprietor of Lot 16; and (ii) the ground stated in the defendant's statutory declaration that the defendant's contractor had accidentally planted outside of the boundary of Lot 70 Sawai Land District over an area of land measuring approximately 720 hectares believed to be State Land did not disclose that the defendant had any legal or beneficial interest in the affected area or any caveatable interest in Lot 16. The plaintiffs also questioned as to whether the occupation and cultivation of the said subject land which was then a state land had conferred on the defendant any caveatable interest. The plaintiffs submitted that such occupation would be punishable under s. 209(1) of the Sarawak Land Code ('SLC'). The plaintiff also contended that under s. 44 of the SLC, the defendant could not acquire any right or title to the subject land by virtue of the unlawful occupation. The defendant, however, argued that the defendant had entered and proceeded with the planting of the subject land

with the knowledge of the Department of Land and Survey ('DLS'). The defendant also submitted that it had applied for the subject land in compliance with the Land Rules 3, 4, 5, 6, 8 and 10 and that its application had not been cancelled by DLS to date.

Held (allowing plaintiff's application):

(1) Land Rules 3, 4, 5, 6, 8 and 10 merely explained the procedure involved in an application for land. There was nothing in the Land Rules that would guarantee that such an application for the said subject land would be approved. Those rules were of no help to the defendant's application for the subject land. However, ss. 10(1), 44 and 209(1) of the SLC made it unlawful for any occupation of state land and the penalty that would be imposed. (paras 18 & 19)

(2) Once the DLS had issued the Provisional Land ('PL') to the plaintiffs in respect of Lot 16, the same could be inferred that the DLS had properly processed the second plaintiff's application for Lot 16, therefore Lot 16 was no longer available for application by others including the defendant. The said Lot 16 could only be cancelled by the DLS in accordance with the provision of the SLC and there had to be good reason for doing so. The court ought not to lend its hand where there was contravention of s. 44 of the SLC. (paras 33 & 39)

(3) The defendant had submitted that it had beneficial interest in the said land as provided in s. 173 of the SLC and alternatively, by virtue of the pending suit against the plaintiff in Suit MYY-22-NCvC-17/12-2014 ('the suit') claiming declaratory relief. The defendant submitted that the said suit sufficiently clothed the defendant with a caveatable interest to validly caveat Lot 16. A legal action does not by itself invest the caveator with a caveatable interest otherwise all is needed is for the caveator to file a suit and the caveat could not be removed until the suit is disposed of. Further, the said suit had yet to be heard. The defendant in the said suit claimed for a potential interest in Lot 16 in the future. However, the interest should be an existing interest that would entitle the defendant to maintain the said caveat and not a contingent interest or an interest *in futuro*. (paras 37 & 40)

(4) Another matter that should be taken into account was the inordinate and inexcusable delay in filing the said suit. The defendant's pending suit was only filed on 5 December 2014 which was more than two years after the caveat was registered. In these circumstances, on the ground of delay alone, the caveat must be removed forthwith. Thus, it went without saying that the balance of convenience was for this court to remove the said caveat. (paras 41 & 51)

Case(s) referred to:

Borneo Pulp & Paper Sdn Bhd v. Entika Ak Abus & Ors [2001] 1 LNS 249 HC ***(refd)***
Chai Chin Foo & Anor v. Assistant Registrar, Land & Survey Department, Samarahan Division & Anor [2008] 7 CLJ 1 HC ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***
Kerajaan Negeri Sarawak & Ors v. Basnol Abol (Si mati) & Ors & Other Appeals [2003] 1 CLJ 253 CA ***(refd)***
Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock [2005] 3 CLJ 188 CA ***(refd)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***
Kwan Yoon Fatt & Sons Sdn Bhd & Ors v. Trends Buildings Sdn Bhd [1993] 3 CLJ 485 HC ***(refd)***
Law Pik Tai v. Wong Nyiik Foon [2002] 4 CLJ 486 HC ***(refd)***
Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(refd)***
Looi Imm Meng v. Oh Tian Tee [2012] 1 LNS 1329 HC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Mahadevan & Anor v. Patel [1975] 1 LNS 95 FC ***(refd)***
Mok Yong Kong & Anor v. Mok Yong Chuan [2002] 3 CLJ 615 CA ***(refd)***
Mosbert Bhd (In Liquidation) v. Stella D' Cruz [1985] 1 LNS 47 FC ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***
Ngu Tai Hua @ Ngu Tai Wan v. Ho Yut Tong [2003] 1 LNS 585 HC ***(refd)***
Onn Yee Kien & Anor v. On Giin Chuang [2013] 5 CLJ 837 CA ***(refd)***
Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Raman Chettiar v. Teo Gee & Anor And Vinaitheethan Chettiar v. Tan Kian [1934] 1 LNS 56 HC ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 1 LNS 135 PC ***(refd)***
Score Options Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(foll)***
SOP Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors [2004] 1 LNS 331 HC ***(refd)***
Tan Kit Theng v. RHB Finance Bhd & Ors [1999] 1 LNS 142 HC ***(refd)***
Teo Ai Choo v. Leong Sze Hian [1982] 1 LNS 122 ***(refd)***
Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd [2011] 6 CLJ 137 FC ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***
Zemine Development Sdn Bhd v. Hong Kong Realty Sdn Bhd [2009] 5 CLJ 218 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(e)
National Land Code, ss. 323(1)(1), 323(1)(a)
Land Code (Sarawak) (Cap 81), ss. 2, 10(1), 28(4), 44, 173, 177, 209(1)

For the appellant - Kalveet Sandhu; M/s Sandhu & Co. Advocs.
For the respondent - Jimmy Wee; M/s Jimmy HT Wee & Co. Advocs.

Reported by Suhainah Wahiduddin

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JUDGMENT

Mairin Idang JC:

Introduction

[1] The first plaintiff is the duly appointed attorney of the second plaintiff. The second plaintiff is the registered proprietor of all that parcel of land situated at Sungai Sibuti, Miri containing an area of 304 hectares more or less and described as Lot 16 Bukit Kisi Land District (Lot 16). Lot 16 is still under provisional lease (PL). The first and second plaintiffs shall also be referred collectively as the plaintiffs.

[2] The defendant has entered and planted oil palm trees on approximately 720 hectares of land which included Lot 16 (the subject land).

The Caveat

[3] On the 3 September 2012 the defendant lodged a caveat against Lot 16 at the Miri Land Registry Office as Instrument No. L. 11755/2012 (the said caveat). The grounds in support of the said caveat are stated in the statutory declaration (SD) of Lee Chi Hong dated 7 August 2012. I now reproduce the relevant paragraphs:

> 7. Sometime in the year 1999, the contractor appointed by the company has accidentally planted outside the boundary of Lot 70 Sawai Land District over an area of land measuring approximately 720 Ha, which is shaded in yellow in annexure "A" (hereinafter referred to as "the subject land"). The shaded area was believed to be part of the state land then.
>
> 8. In year 2001, the Company wrote to the Land and Survey Department, Miri to apply for provisional lease to be issued over the said Subject land, in replacement of Lot 14 Bukit Kisi Land District and Lot 200 Bakong Land District.
>
> A copy of the letter dated 12/7/2001 is annexed herein and marked "B".
>
> 9. By a letter dated 26/9/2002, the Land and survey Department, Miri had informed the Company that the said application made by the Company is being considered, and that the Company will be informed of the outcome of the application in due course. The Company had not heard from the Land & Survey Department thereafter.
>
> A copy of the letter dated 26/9/2002 is annexed herein and marked "C".
>
> 10. A few weeks before the date of this declaration, the Company discovered that there were surveyors entering into the subject land for the purpose of conducting a survey. The Company later found out from the surveyors that part of the subject land is now held by Metro Presence Sdn Bhd under a provisional lease described as Lot 16, Bukit Kisi Land District.
>
> A copy of the land title issued to Metro Presence Sdn Bhd is annexed herein and marked as "D".

11. As the Company has fully planted oil palm on the subject land and invested considerable amount of money in building the infrastructure on the subject land, I am advised by M/S Jimmy H. T. Wee & Co Advocates that the Company has a caveatable interest over the subject land.

Application To Remove The Caveat

[4] On the 1 October 2014 the plaintiffs filed an application (encl. 1) to remove the said caveat. The grounds in support of the plaintiffs' application are stated in the affidavit in support (the AIS) of Mr Chia Chok Hian as follows:

(a) The second plaintiff is still the registered proprietor of Lot 16;

(b) The first plaintiff is the attorney for the second plaintiff in respect of Lot 16;

(c) On 3 September 2012 the defendant had lodged the said caveat registered as Instrument No. L. 11755/2012 at Miri Land Registry Office against Lot 16 claiming to be entitled to or beneficially interested in the said Lot 16.

(d) The ground stated in the defendant's statutory declaration that the defendant's contractor had accidently planted outside of the boundary of Lot 70 Sawai Land District over an area of land measuring approximately 720 hectares believed to be State land does not disclose that the defendant has any legal or beneficial interest in the said affected area or any caveatable interest in Lot 16.

The Parties' Affidavits

[5] The parties have filed the following affidavits:

(a) Affidavit in support (encl. 2) affirmed by Chia Chok Hian on 1 October 2014 (AIS);

(b) Affidavit in reply (1) (encl. 6) affirmed by Mr Chia Chok Hian on 24 November 2014 (AIR);

(c) Affidavit in opposition 1 (encl. 5) affirmed by Lee Chi Hong on 11 November 2014 (AIO1); and

(d) Affidavit in opposition 2 (encl. 7) affirmed by Mr Lee Chi Hong on 8 December 2014 (AIO2).

The Parties' Submissions

[6] Both parties have filed the following submissions:

(a) Plaintiffs' submission dated 30 December 2014;

(b) Plaintiffs' reply submission dated 9 February 2015;

(c) Defendant's submission dated 19 January 2015; and

(d) Defendant's submission in reply dated 9 February 2015.

Plaintiffs' Submission

[7] Learned counsel for the plaintiffs said "… it is patently clear that the material facts relied upon the defendant to sustain the caveat are set out in paras. 7, 8, 9, 10 and 11 of the statutory declaration". Learned counsel also asserted that only the grounds in support of the said caveat as stated in the SD are to be considered and that other grounds raised by the defendant's affidavits are to be rejected because such consideration on "… other grounds outside those stated in the application for the caveat 'cannot be the law' and 'is not the law'. It is also contended that the defendant must be held to the grounds stated in the caveat or SD".

[8] The plaintiffs also said the question is whether the occupation and cultivation of the said subject land which was then a state land had conferred on the defendant any caveatable interest. Learned counsel for the plaintiffs submitted such occupation and cultivation was deemed unlawful under s. 10(1) of Sarawak Land Code (SLC) and that such unlawful occupation would be punishable under s. 209(1) of the SLC. Learned counsel also contended that under s. 44 of the SLC the defendant could not acquire any right or title to the subject land by virtue of the unlawful occupation.

[9] The plaintiffs have referred to the following cases: *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77; [1996] 3 MLJ 437, *Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock* [2005] 3 CLJ 188; [2005] 4 MLJ 493, *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489, *Kerajaan Negeri Sarawak & Ors v. Basnol Abol (Si mati) & Ors & Other Appeals* [2003] 1 CLJ 253; [2003] 1 MLJ 376, *Law Pik Tai v. Wong Nyiik Foon* [2002] 4 CLJ 486, *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 3 CLJ 615; [2002] 2 MLJ 718, *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135; [1976] 2 MLJ 44 and *Raman Chettiar v. Teo Gee & Anor And Vinaitheethan Chettiar v. Tan Kian* [1934] 1 LNS 56; [1936] 1 MLJ 129, *Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd* [2011] 6 CLJ 137; [2011] 4 MLJ 681 FC and *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 6 MLJ 475 FC.

Defendant's Submission

[10] Learned counsel for the defendant submitted: "… defendant has established caveatable interest in the said Lot 16 by virtue of the fact that the defendant had fully planted oil palm on 720 hectares of land (including Lot 16). The oil palms are fully grown and are attached to the land creating rights *in rem* which ran with the land. The defendant clearly had beneficial interest in the said land as provided in s. 173 of the SLC. Alternatively …

by virtue of the pending suit against the plaintiff and seven others in suit MYY-22-NCvC-17-12-2014 (HC) claiming declaratory relief against the plaintiff and seven others … the said suit sufficiently clothed the defendant with caveatable interest to validly caveat the said Lot 16".

[11] Learned counsel went on to say that the guiding principle in the exercise of that power in s. 177 of the Sarawak Land Code (SLC) is the principle of justice and therefore the court has a very wide power and discretion to make whatever order it deems just. Learned counsel also contended that the court could determine the issue of caveatable interest not only on matters raised in the caveat itself but also in suit MYY-22-NCvC-17-12-2014 (HC) (the suit) as well as those raised in the affidavits filed by the parties to the proceedings.

[12] It is also contended that the defendant had entered and proceeded with the planting of the subject land from 2001 to 2012 with the knowledge of the Department of Land and Survey (DLS). The defendant argued that there was therefore an implicit consent of DLS to allow the defendant to plant and occupy the subject land which included Lot 16. The defendant also submitted that it had applied for the subject land in compliance with Land Rules 3, 4, 5, 6, 8 and 10 and that its application has not been cancelled by DLS to date.

[13] The defendant had referred to *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212, *Mosbert Bhd (In Liquidation) v. Stella D' Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446, *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150; [1992] 1 MLJ 263, *Zemine Development Sdn Bhd v. Hong Kong Realty Sdn Bhd* [2009] 5 CLJ 218, *Looi Imm Meng v. Oh Tian Tee* [2012] 1 LNS 1329 and *Law Pik Tai v. Wong Nyiik Foon* [2002] 4 CLJ 486.

Court Analysis

[14] Let me start by discussing the backgrounds of the subject land. The defendant said when it entered the said subject land in 1999 it was then a state land; that its contractor had accidentally planted the subject land with oil palm trees. The defendant then submitted an application for this subject land in July 2001. There were letters from the DLS that the defendant's application was being processed but no approval was issued to date. However unbeknown to the defendant the DLS had on the 20 April 2012 leased 304 hectares (Lot 16) of the subject land to the second plaintiff and issued it with provisional land (PL). The defendant said it only came to know of this when surveyors had entered the subject land in July 2012 to do survey.

[15] Now before discussing the law on caveat I need to discuss what the SLC has to say on the status of state land, land application, entry into a state land, planting on it and the status of PL. Such discussion would have bearing

in my decision in this application. Learned counsel for the defendant submitted the defendant's land application for the subject land was done in compliance with the Land Rules governing such land application namely Land Rules 3, 4, 5, 6, 8 and 10. Learned counsel for the plaintiffs however says of the SLC do not give any rights to the defendant on the unlawful occupation of the subject land.

[16] For clarity let me reproduce 3, 4, 5, 6, 8 and 10 the Land Rules:

3. Particulars required in applications for State land

(1) Every application for State land shall state the full name and address of each and every applicant, including in the case of a native, the name of the father, provided that in the case of a corporate body it shall be sufficient to state the corporate name by which the body is known.

(2) An application may not be made in the name of an unincorporated body, which expression includes Chop and Kongsi.

(3) An application shall contain a description of the land sufficient to identify it and shall provide on the reverse side of the application form a sketch indicating clearly the situation of the particular parcel of land for which the application is made.

(4) The signature of each and every applicant shall be his usual signature, whether in Roman, Jawi, or Chinese script, or his usual mark, as the circumstances may require, and, for the purpose of the future identification of the applicant, his thumbprint may, with the consent of the applicant, be added.

(5) When an applicant desires more than one parcel of land, a separate application shall be made in respect of each parcel.

4. Application Where made

An application for State land shall be made either to the District Officer of the district in which the land is situate or to the Superintendent of the division. If the application has been made to the District Officer, it shall subject to be recorded by him in the book kept for the purpose and then forwarded to the Superintendent of the division.

5. Application to be recorded

(1) An application shall not be recorded unless the officer receiving the same is satisfied:

(a) that the application has been made in good faith;

(b) that a grant in pursuance thereof would not contravene the instructions of the Director to the Superintendent under section 1393), or the directions to the Director by the Minister under section 13(1), of the Code; and

(c) that all necessary particulars have been given by the applicant.

(2) The receiving officer may require the production of evidence as to the identity of the applicant.

(3) Any refusal to record an application and the grounds of such refusal shall be reported to the Superintendent who may if he considers that it should have been recorded, direct accordingly.

Rule 6. Fee on recording

(1) A fee of two dollars shall be payable by the applicant upon the recording of each application. The fee so paid shall be refunded to the applicant if a lease or grant of the land is refused by the Superintendent:

Provided that, if the application is cancelled by the Superintendent under 1092) (a) or (b) or if it is deemed by the Superintendent to be frivolous or to have been made in bad faith, the fee may be forfeited.

Rule 8. Register

(1) A register of applications shall be kept in every Land and Survey Office.

(2) The following particulars shall be entered in the Register:

(a) the serial number of the application;

(b) the name of the applicant and the date the applicant was recorded;

(c) the district in which the land is situate and, so far as possible, its exact location;

(d) the approximate area applied for;

(e) the name of the officer who recorded the application;

(f) the date of marking out and survey;

(g) the number of the grant or lease and its date of issue.

Rule 10. Cancellation of applications.

(1) The Superintendent may in his discretion, exercised in accordance with the directions of the Minister and the instructions of the Director under section 13 of the Code, cancel any application for land at any time prior to the execution of the lease or grant of such land.

(2) Without prejudice to the generality of paragraph (1) the Superintendent may cancel any application in any of the following circumstances:

(a) if the applicant has left the district without notifying the Superintendent of his own address or of that of an agent appointed to act on his behalf;

A (b) if the applicant has died prior to the issue of the lease or grant;

(c) If, in the opinion of the Superintendent, the issue of the title to the applicant would be prejudicial to the interests of Sarawak or of the public.

B **[17]** Let me also reproduce ss. 10(1), 44 and 209(1) of the SLC:

Section 10(1): Without prejudice to section 5(2)(e) or section 29 or to the provisions of any written law, no person may occupy or exercises any rights or privileges over any Mixed Zone or Native area Land save under a valid and subsisting document of title and, if the land in question is unalienated, any occupier thereof shall be deemed to be in unlawful C occupation of State land and section 209 shall apply thereto.

Section 44: No person shall acquire any right or title against the Government by virtue of any adverse possession, unlawful occupation or occupation under temporary licence, and no right or title shall be acquired against the Government, save such right or title as may be lawfully D granted under this Code.

Section 209(1): Any person who, without lawful authority:

(a) Occupies, or erects any building on, any State land; or

(b) Clears, ploughs, digs, encloses or cultivates any such land or part thereof,

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Shall be guilty of an offence: Penalty, in the case of a first offence, a fine of one thousand ringgit and, for a second or subsequent offence, imprisonment for two years and a fine of five thousand ringgit.

F **[18]** Having read Land Rules 3, 4, 5, 6, 8 and 10 it is my view that these rules merely explained the procedure involved in an application for land. There is nothing there in the Land Rules that would guarantee that such an application for the said subject land would be approved. Those rules are of no help to the defendant's application for the subject land.

G **[19]** I have also read ss. 10(1), 44 and 209(1) of the SLC referred to by learned counsel for the plaintiffs. Those sections made it unlawful for any occupation of state land and the penalty that would be imposed. Section 44 is very clear: "*No person shall acquire any right or title against the government by virtue of any adverse possession, unlawful occupation or occupation under* H *temporary licence and no right or title shall be acquired against the government, save such right or title as may be lawfully granted under this Code*". (emphasis added)

[20] I am therefore in agreement with learned counsel for the plaintiffs that those sections he has referred to have amply answered the defendant's assertion of having been in occupation of the subject land for 11 years as well I as the alleged DLS's implicit consent for the defendant to remain in occupation would guarantee the alienation of the subject land to the defendant.

[21] Having considered the status of the defendant, namely its application, entry into, cultivation and occupation of the subject land *vis-à-vis* the Land Rules and the provisions of SLC which I have reproduced hereinabove I now consider whether I should allow the plaintiffs' application to remove the said caveat on the said Lot 16 bearing in mind that Lot 16 is still a PL.

[22] Now what does the SLC has to say on the status of a land issued with a PL. Section 28 of the Code states:

> (1) No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent:
>
> Provided that, when immediate survey of any state land is impracticable, the Superintendent may order that a provisional lease in Form C in the First Schedule be executed in favour of the person entitled.
>
> (2) Every provisional lease shall specify the approximate extent and area of the land included therein but shall not entitle the holder to a grant or lease of the whole area specified.
>
> (3) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease shall have no right to registration of a lease in Form B in the First Schedule for an area equal to the area stated to be alienated if on survey such area is found not to be available.
>
> (4) Save where the context otherwise requires, this Code in connection with leases shall apply to provisional leases and references to a lease shall include a provisional lease.

[23] Section 2 of the SLC states that:

> "alienation" means the sale, lease or other disposal by a document of title of State land by or on behalf of the Government;
>
> "document of title" means a grant, lease of State land, occupation ticket or other document evidencing title to land whenever issued, but does not include a licence, permit or caveat;

[24] Section 28(4) and s. 2 of the SLC are wide enough to cover a PL as a document of title for the alienation of Lot 16 to the second plaintiff. In *SOP Plantations (Suai) Sdn Bhd v. Ading Layang & 5 Ors* [2004] 1 LNS 331 Dato' Abdul Aziz bin Abdul Rahim JC (as he then was) had stated:

> In this regard reference to section 2, the interpretation section, of the Code is useful. That section defines the term 'alienation' to mean 'sale, lease or other disposal by a document of title of State land by or on behalf of the Government … In this instant case the plaintiff was given a provisional lease. That is alienation.

[25] Exclusive possession of Lot 16 is given to the second plaintiff to enable the second plaintiff to commence development activities. In *Borneo Pulp & Paper Sdn Bhd v. Entika Ak Abus & Ors* [2001] 1 LNS 249 Sulaiman Daud JC (as he then was) concluded:

> It is not disputed that the plaintiff is the holder of a provisional lease in respect of the said land by which it is authorised to enter into possession thereof. By virtue of the provisional lease, being a document evidencing title to the said land, the plaintiff is also entitled to develop and enjoy the same in accordance with the terms and conditions stipulated therein.

[26] I must say there are plethora of decided cases on the removal of caveat. Lest we forget those cases on caveat under the National Land Code (NLC) are also applicable on caveat under the Sarawak Land Code (SLC) (See *Chai Chin Foo & Anor v. Assistant Registrar, Land & Survey Department, Samarahan Division & Anor* [2008] 7 CLJ 1).

[27] Now what is the law on caveats? It is trite that the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests. It is also trite that not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat: *Mahadevan & Anor v. Patel* [1975] 1 LNS 95. The purpose of a caveat is therefore to preserve the *status quo* pending the taking of timeous steps by a caveator to enforce his or her claim to an interest in the land by proceedings in courts: *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 1 LNS 135.

[28] The registered owner of the land also has a *prima facie* right to have the caveat removed unless the defendant can establish that it has an interest in the land which needs to be protected: *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441. The defendant has the onus to satisfy the court that on the evidence presented its claim to an interest in the land raises a serious question to be tried and having done that the defendant must then go on to show that on the balance of convenience it would be better to maintain the *status quo* until the determination of the trial by preventing the registered owner from disposing the land to a third party: *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18.

[29] I must say that in dealing with such application for removal of caveat the case of *Luggage Distributors* will always come to mind. I think it is because of the three stages that were formulated therein. The *Luggage Distributors*, *supra* was decided in 1995 and it had been cited and referred to in subsequent cases. But learned counsel for the defendant has urged me to distinguish and

depart from the approach decided by the *Luggage Distributors* case. Learned counsel says "The defendant invites your Lordship to distinguish and depart from the mechanical approach enunciated in the *Luggage* case …" I am afraid I cannot accept the said invitation as I am bound by that decision. It is presently the law and being referred to.

[30] Now what are the three stages enunciated in the *Luggage Distributors*. In *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77; [1996] 3 MLJ 437 it was held (2) "There are three hurdles which a caveat must surmount before it may be permitted to remain upon the register. An investigation into the following matters are required: (i) whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest; (ii) if he has established a caveatable interest, then, whether the evidence he produced in support of his claim to that caveatable interest discloses a serious question to be tried; and (iii) if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit (see *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782).

[31] With that in mind let me consider whether the defendant had satisfied hurdle (i) the case law says at this stage I need to look at the caveat itself namely the grounds relied upon to support the caveat. It has also been decided that a caveator must be held to the grounds he alleged in his application in the statutory form (in the SLC its Form O) (see *Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock* [2005] 3 CLJ 188; [2005] 4 MLJ 493 and *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 3 CLJ 615; [2002] 2 MLJ 730, *Law Pik Tai v. Wong Nyiik Foon* [2002] 4 CLJ 486, *Goh Paik Swan v. Ng Choon Lum* [1997] 1 CLJ 77; [1996] 3 MLJ 437).

[32] In the instant case it is stated in Form O, the caveator: "Claiming to be entitled to or to be beneficially interested in the said property under and by virtue of the statutory declaration of Lee Chi Hong (WN KP 511004-015459) affirmed on 7 August 2012". The caveator here is the defendant and the property is Lot 16. The grounds are in the SD (See para. [3] above).

[33] I think the grounds stated in the SD have been amply answered in my discussion on Land Rules 3, 4, 5, 6, 8 and 10 and ss. 10(1), 44 and 209(1) of the SLC relied by the both the plaintiffs and the defendant respectively. I agree with the plaintiffs that the grounds stated in the SD are insufficient in law to support the said caveat. The land application *per se* though registered does not give the defendant any rights to Lot 16 which had already been

issued with the PL. Further there is nothing in the SLC that would guarantee the alienation of the said subject land including Lot 16 to the defendant. On the other hand the occupation of the subject land is illegal and has always been illegal. In fact my finding is that once the DLS had issued the PL to the plaintiffs in respect of Lot 16 the same could be inferred that the DLS had properly processed the second plaintiff's application for Lot 16 therefore Lot 16 is no longer available for the application by others including the defendant. Further it is also my view that the issuance of the PL by DLS also raised the presumption of regularity under s. 114(e) of the Evidence Act 1950.

[34] Now how about stage (ii) is there any serious issue that I should allow the caveat to stay or maintain the *status quo*. I think none if I am only to look at the SD. But the defendant says there are serious issues to be tried: (1) whether the application for alienation of Lot 16 by the plaintiff was in breach of the Land Code, (2) whether the provisional lease to Lot 16 should be forfeited or revoke and the same should be alienated to the defendant instead, (3) whether the plaintiff would be able to comply with the special conditions stated in the provisional lease to enable the Land & Survey to issue a permanent lease to the plaintiffs, (4) if the plaintiffs is not able to comply with the special conditions what would happen to the provisional lease to Lot 16 and (5) whether the defendant is entitled to the alienation of provisional lease to the said Lot 16. Now these issues are matters that are pleaded in the said suit.

[35] Learned counsel for the plaintiffs submitted the issues raised by the defendant do not form part of the grounds in support of the caveat as stated in the SD bearing in mind that the defendant must be held to the grounds stated in the caveat or SD (See *Mok Yong Kong & Anor v. Mok Yong Chuan* [2002] 3 CLJ 615; [2002] 2 MLJ 730, 722). Learned counsel also said that the suit was not referred to in the SD and therefore the court needs not refer to it. Learned counsel for the defendant however has urged me to look at the suit that it had filed on 5 December 2014. It is the defendant's contention that the issues raised therein are serious issues which require full trial as such the caveat ought to be maintained.

[36] The law is clear that it is in stage (ii) that I need to consider all documents before me such as the SD, the affidavits and the said suit filed by the defendant and consider whether there are serious issues to be determined that would warrant the continuation of the caveat. Now in so far as the grounds in the SD in support of the said caveat I have already said that the grounds are unsustainable in view of the status of the defendant's entry, cultivation and application of the subject land. I have said that those Land Rules relied upon by the defendant are of no help. The land application submitted by the defendant does not give the defendant any right or interest

in the subject land. Further the sections in the SLC referred to by the plaintiffs made such entry into or occupation of state land unlawful and subject to penalty. I have also addressed this issue in paras. [18] to [20] above.

[37] To me a legal action does not by itself invest the caveator with a caveatable interest otherwise all that is needed is for the caveator to file a suit and the caveat could not be removed until the suit is disposed of. In *Tan Kit Theng v. RHB Finance Bhd & Ors* [1999] 1 LNS 142; [1999] 5 MLJ 533, the plaintiff applied to extend the caveat until the trial of the action, Muhammad Kamil J (as he then was) held: "… The plaintiff has failed to establish that he has a caveatable interest. The two actions pending in the court are not sufficient to clothe the plaintiff with a caveatable interest".

[38] Now in the said suit the defendant had sued Chia Hon Thin, Awg Mahyan bin Awg Mohamed, Dayang Masbah binti Abg Zawaai, Metro Presence Sdn Bhd, Teak Paradise Sdn Bhd, Superintendent Land & Survey, Director of Land & Survey Sarawak, and the Government of the State of Sarawak. The claims are basically to declare the PL invalid or void, to direct the Director of Land & Survey and the State Government of Sarawak to forfeit or revoke the PL, damages against Chia Hon Thin, Awg Mahyan bin Awg Mohamed, Dayang Masbah binti Abg Zawaai, Metro Presence Sdn Bhd, Teak Paradise Sdn Bhd, injunction against Metro Presence Sdn Bhd and Teak Paradise Sdn Bhd.

[39] The defendant's claims are premised on the entry into the subject land, accidentally planting it with oil palm trees and having submitted a land application for the same. As I have discussed Land Rules 3, 4, 5, 6, 8 and 10 and ss. 10(1), 44 and 209(1) of the SLC would not support the defendant's claims. Section 44 of the SLC would be against the defendant. Further the DLS had already issued a PL to the plaintiff for Lot 16. The said Lot 16 is no longer available to the defendant. The said Lot 16 can only be cancelled by the DLS in accordance with the provision of the SLC and there has to be good reason for doing so. In my opinion the court ought not to lend its hand where there is contravention of s. 44 of the SLC.

[40] Now the said suit has yet to be heard. Whatever may the decision be, that decision however would be in the future. In short the defendant in the said suit is claiming for a potential interest in Lot 16 in the future. Now the Federal Court in *Score Options Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 6 MLJ 475 had held at [39] "It is also our considered view that the caveator under s. 323(1)(a) of the NLC must have a present interest as opposed to a potential interest in the land. The registrable interest that the caveator is claiming for, must be an existing interest. The caveator under s. 323(1)(a) of the NCL must be limited to those who are claiming to an existing interest in the land or right to such existing

interest and cannot include potential interest or interest *in futuro*". The decision in that case equally applies in the instant case. What we are talking about is existing interest that would entitle the defendant to maintain the said caveat and not a contingent interest or an interest *in futuro*.

[41] The other matter that I should take into account is the delay in filing the said suit. In the instant case the plaintiffs took issue on the delay of filing the said suit. Learned counsel for the plaintiffs submitted: "It must be noted that the defendant's said pending suit was only filed on 5 December 2014 which is more than two years after the caveat was registered. It ought to be also noted that the said suit was filed two months after the filing of the instant application dated 1 October 2014". Is the suit filed timeously? Is two years of filing of the suit after entering the caveat considered timeous bearing in mind a legal action does not by itself invest the caveator with a caveatable interest.

[42] There are cases where the caveat was removed due to failure to commence suit timeously. In *Onn Yee Kien & Anor v. On Giin Chuang* [2013] 5 CLJ 837 CA at [35] on the requirement to commence a court action timeously this is what the Court of Appeal said: "No person should be allowed to lodge a caveat over another person's land and, thereafter, just sit back and do nothing to enforce any claim to the proprietary right that he alleges he has in respect of the caveated land (for example, a claim to title; or, a claim to a registrable interest). That would not be fair to the landowner who, while the caveat exists, is prohibited from dealing with his land. The lodging of a caveat is not and end in itself; it is just a means, a temporary measure, to preserve the caveator's claim to a proprietary right in respect of a land, pending determination of that claim by a court".

[43] In the Singapore High Court case of *Teo Ai Choo v. Leong Sze Hian* [1982] 1 LNS 122; a delay of 11 months from the date the caveat was lodged during which period no action was filed by the caveator, was held to be sufficient as the sole factor for removal of the caveat. Sinnathuray J held, *inter alia*:

> First, I accept the decision in *Plimmer Bros v. St Maur*. In that case, Stout CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said:
>
> > It was his duty to commence an action promptly if he considered himself entitled to specific performance .... Here nothing was done for nearly sixteen months, and then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under

> such circumstances must be deemed vexatious ... in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.
>
> In this case on the facts before me I find that there has been inordinate and inexcusable delay. The dispute between the parties has arisen from an agreement for sale and purchase of a house in Serangoon Garden signed on September 1, 1979. It was not till 21 months later that a caveat was lodged on June 11, 1981. Then, from this date to the date of the hearing of this application on May 7, 1982, no action has been commenced by the defendant against the plaintiff in respect of the dispute, a lapse of 11 months. In these circumstances, having regard to the foregoing, on the ground of delay alone, the caveat must be removed forthwith.

[44] The Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, where *Teo Ai Choo* (*supra*) was cited with approval, held that in order to establish a caveatable claim to title to or registrable interest in land under s. 323(1) of the NLC, it is a must for the caveator to file a claim within a reasonable time for adjudication.

[45] The Court of Appeal in *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629 explained the rationale for the court's insistence on prompt disposal of caveats as follows (per Gopal Sri Ram JCA (as he then was)):

> It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

[46] In *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909 a delay of about 21 months in initiating proceedings without explanation was considered excessive by the Court of Appeal and that, under the circumstances it "would be an affront to justice to prevent the appellant from continuing to deal with the land".

[47] In *Kwan Yoon Fatt & Sons Sdn Bhd & Ors v. Trends Buildings Sdn Bhd* [1993] 3 CLJ 485 a delay of eight months in suing for specific performance tilted the balance of convenience against the caveator.

[48] In *Ngu Tai Hua @ Ngu Tai Wan v. Ho Yut Tong* [2003] 1 LNS 585; [2004] 2 AMR 469 the caveat was removed where action only taken one year eleven months after caveat lodged and with no explanation offered for the delay.

[49] I have read the defendant's affidavits and submissions I cannot find any explanation on the reasons for the delay in filing the said suit.

[50] On stage (iii) where is the balance of convenience? It has been held that: "The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 (Privy Council) as 'the balance of convenience'." And it was also held: "… if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit" (See *Goh Paik Swan*, *supra*).

[51] I have discussed extensively on the two stages above. I think the defendant has not "crossed the first two hurdles or that the first two questions are resolved in the defendant's favour". Having said that I think it goes without saying the balance of convenience is for this court to remove the said caveat.

[52] For reasons stated above I allow the plaintiffs' application and order the said caveat be removed. Costs of RM10,000 to the plaintiffs.